

ORAL ARGUMENT SCHEDULED ON SEPTEMBER 14, 2023

U.S. COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

States of Texas, Alabama, Alaska,
Arkansas, Indiana, Kentucky,
Louisiana, Mississippi, Missouri,
Montana, Nebraska, Ohio, Oklahoma,
South Carolina, and Utah,

Petitioners,

v.

U.S. Environmental Protection Agency
and Michael S. Regan, Administrator,

Respondents.

Case No. 22-1031 and consolidated
cases

Natural Resources Defense Council,

Petitioner,

v.

National Highway Traffic Safety
Administration, et al.,

Respondents.

Case No. 22-1080 and consolidated
cases

Joint Proposed Argument Format

As directed by the Court on July 11, 2023, the parties in *Texas v. EPA*, Case No. 22-1031 and consolidated cases, and *NRDC v. NHTSA*, Case No. 22-1080 and consolidated cases propose the following argument format for the two cases:

Case 1:

<i>Texas v. EPA</i>, Case No. 22-1031 and consolidated cases			
Issues	Argument	Time	Counsel
1. Whether petitioners' arguments are properly before the Court.	Fuel Petitioners' opening	17 min.	Jeffrey Wall (addressing issues 1-3)
2. Whether EPA's rule is authorized under Section 202 of the Clean Air Act, 42 U.S.C. § 7521, including whether the major questions doctrine forecloses the rule.	State Petitioners' opening	8 min.	Lanora Pettit (addressing issues 2-3)
3. Whether EPA's rule is arbitrary and capricious in light of EPA's consideration of upstream emissions, its cost-benefit analysis, or its consideration of the Interagency Working Group's social cost of greenhouse gases.	EPA's response	18 min.	Sue Chen (addressing issues 1-2)
	EPA's response	6 min.	Daniel R. Dertke (addressing issue 3)
	Intervenors' response	6 min.	Sean Donahue ¹
	Fuel Petitioners' rebuttal	5 min.	Jeffrey Wall

¹ Under Cir. R. 34(c), Respondents respectfully request leave for two counsel to appear for Respondents and one counsel for Intervenors. Division of the argument between two counsel for Respondents is appropriate given the number of issues and the lack of overlap between the issues raised in each proposed argument segment. Respondents request that time also be afforded to one counsel for Intervenors, Sean Donahue, which will allow the Court to consider the interests of Public Interest Respondent-Intervenors who support the agency rule under review.

5-minute break**Case 2:**

<i>NRDC v. NHTSA</i>, No. 22-1080 and consolidated cases			
Issue	Argument	Time	Counsel
Argument on petition for review filed by Natural Resources Defense Council, No. 22-1080			
1. In setting fuel-economy standards under 49 U.S.C. § 32902, whether NHTSA's treatment of high-compression-ratio Atkinson-enabled engines was arbitrary and capricious, in particular with regard to (a) pickup trucks and (b) vehicles that share an engine with pickup trucks.	NRDC opening	12 min	Pete Huffman
	NHTSA response	15 min	Joshua Koppel
	NRDC rebuttal	3 min	Pete Huffman
Argument on petitions for review filed by States and American Fuel & Petrochemical Manufacturers, Nos. 22-1144 and 22-1145			
1. Whether NHTSA complied with 49 U.S.C. 32902(h) when it amended the corporate average fuel economy standards for model years 2024-2026 passenger cars and light trucks. 2. Whether, in light of the Energy Policy and Conservation Act's preemption provision, 49 U.S.C. § 32919(a), NHTSA erred when it accounted for state zero-emission-vehicle mandates.	Fuel Manufacturer/State petitioners opening	17 min	Eric McArthur (addressing issue 1)
	Petitioner-intervenors opening	8 min	Michael Buschbacher (addressing issue 2)
	NHTSA response	22 min	Joshua Koppel
	Respondent-intervenors response	8 min	Theodore McCombs

	Fuel Manufacturer/State petitioners rebuttal	5 min	Eric McArthur
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Because the petition for review filed by NRDC and the petitions for review filed by the Fuel Manufacturer and State petitioners in *NRDC v. NHTSA* raise distinct issues, the parties agree that argument should proceed separately with regard to each of those sets of petitions. That is, the Court should hear opening argument from one set of petitioners, response from NHTSA, and rebuttal before moving on to argument on the other petition(s). However, the parties disagree as to whether argument should be heard first on NRDC's petition or the Fuel Manufacturers' and States' petitions.

Position of NRDC (petitioner in No. 22-1080 and respondent-intervenor in Nos. 22-1144 and 22-1145):

NRDC submits that the petitions should be argued in the order they were filed, and that there is no good reason to reverse the order of argument. To the extent the later-filing petitioners view their petitions as weightier, NRDC disputes the premise (among other things, NHTSA argues that the later-filing petitioners' principal alleged error is harmless but concedes NRDC's is not). In any event, it is not a basis to reorder argument.

Indeed, because the *NRDC v. NHTSA* case is being heard immediately after *Texas v. EPA*, reordering the petitions in *NRDC* risks confusing issues. *NRDC*'s lead petition presents issues that will not risk conflation with those in *Texas*. As the other petitioners' initial filings in *NRDC* acknowledge,² their petitions do not present any substantially similar issues as *Texas* either—but they have signaled their intent to present their case as, in their view, thematically linked to *Texas*. Having such a presentation directly after *Texas* presents a risk of confusing the issues for the Court.

Position of State and Local Intervenors, Intervenor Public Interest Organizations, the National Coalition for Advanced Transportation, and the Zero Emission Transportation Association (respondent-intervenors in Nos. 22-1144 and 22-1145):

Respondent-Intervenors agree the *NRDC* petition should be argued first. Arguing the *NRDC* petition before the Fuel Manufacturer and States' petition will allow for a more orderly presentation of the issues, and, if those petitioners are correct that their arguments will take up more time, would allow for more extensive questioning on their petition (if needed) without prejudice to either set of parties.

² *E.g.*, Dkt. No. 1957293, ¶ 6(g).

The parties strongly dispute whether *Texas v. EPA* and the Fuel Manufacturer and States' petition in *NRDC v. NHTSA* share any significant legal or factual overlap—the initial filings and briefing show none. Respondent-Intervenors particularly dispute the notion that the conclusory references to the major questions doctrine in the Fuel Manufacturer and States' opening brief create any substantial link to *Texas*. (See Doc. #2000036, at 25, 44 (AFPM and State Petitioners' Brief); Doc. #2000081, at 13 n.2 (State and Local Gov't Respondent-Intervenors' Brief).) The major questions doctrine is a tool to construe whether a given statute's grant of authority includes the agency action at issue; that analysis involves consideration of the particular agency action and the particular statute under which it was taken, and thus provides no reason to hold proximate arguments about two distinct actions under two different statutes. The Fuel Manufacturer and States' preferred thematic framing of their petition does not provide a fair and neutral basis to prioritize their later-filed petition over NRDC's first-filed petition.

Position of the Fuel Manufacturer and State petitioners (petitioners in Nos. 22-1144 and 22-1145) and Biofuel Manufacturers (petitioner-intervenors in Nos. 22-1144 and 22-1145):

The Fuel Manufacturer and State petitioners and Biofuel Manufacturers submit that their cases should be heard first because they present weightier issues, as reflected by the proposed time allocation for the oral argument, by the fact that

NHTSA's brief addressed those issues first and devoted almost twice as many pages to them as to NRDC's, and by the fact that only these petitions, and not NRDC's, seek vacatur of the rule. In addition, Nos. 22-1144 and 22-1145 are more closely related to *Texas v. EPA* in that both cases involve challenges to administrative efforts to force electrification of the Nation's vehicle fleet in ways that petitioners contend trigger the major-questions doctrine.

Position of NHTSA (respondent to all three petitions):

The government takes no position on the order in which these petitions are argued.

Submitted on: August 4, 2023

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I certify that this filing complies with Fed. R. App. P. 27(d)(1)(E) because it uses 14-point Times New Roman, a proportionally spaced font.

I also certify that this filing complies with Fed. R. App. P. 27(d)(2)(A), because by Microsoft Word's count, it has 1148 words, excluding the parts exempted under Fed. R. App. P. 32(f).

Finally, I certify that on August 4, 2023, I filed the foregoing with the Court's CMS/ECF system, which will notify each party.

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